

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7429

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNE K. UNGER,

Plaintiff-Appellant,

—against—

JOHN L. HETTRICK, DAVID J. LAUB, MARINE MIDLAND
BANKS, INC. and PRICE WATERHOUSE & Co.,

Defendants-Appellees,

—and—

EDWARD W. DUFFY, CHARLES G. BLAINE, WM. WARD FOSHAY,
ULRIC HAYNES, JR., ROBERT W. HUBNER, NORTHRUP R. KNOX,
FELIX E. LARKIN, JOHN S. LAWSON, JAMES P. LEWIS, SOL M.
LINOWITZ, WILLIAM A. LYONS, JAMES W. MCKEE, JR., ALLEN
H. NEUHARTH, DAVID H. NORTHRUP, NATHAN R. OWEN,
CORNELIUS W. OWENS, CLIFTON W. PHALEN, GERALD C. SALTA-
RELLI, PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL, JOHN
WILKIE, CHARLES A. WINDING and GERALD B. ZORNOW,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

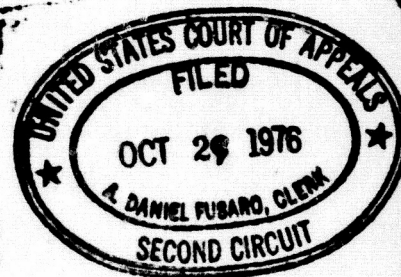
APPENDIX

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PLAINTIFFS

UNGER, ANNE K.

DEFENDANTS

DUFFY, EDWARD W. et al.

NETZNER

(SEE REVERSE SIDE FOR FULL TITLE)

CAUSE

Violation of the SEC Act of 1934 15 USCA Sec 78 (a) et seq. (the
"Exchange Act")

ATTORNEYS

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UNGER, ANNE K. V

DUFFY, EDWARD W. ET AL.

METZNER, J.

FILE

NO.

PROCEEDINGS

TITLE PAGE

ANNE K. UNGER,

Plaintiff,

-against-

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. WARD FOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETTRICK, ROBERT W. HUBNER,
NORTHROP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON,
JAMES P. LEWIS, SOL M. LINOWITZ,
WILLIAM A. LYONS, JAMES W. MCKEE, JR.,
ALLEN H. MEUHART, DAVID H. NORTHROP,
NATHAN R. OWEN, C. JULIUS W. OWENS,
CLIFTON W. PHALEN, GERALD C. SALTARELLI,
PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL,
JOHN WILKIE, CHARLES A. WINDING, GERALD
B. ZORNOW, MARINE MIDLAND BANKS, INC.
and PRICE WATERHOUSE & CO.,
Defendants.

DATE	PROCEEDINGS	Set Judge
01-29-76	-1- Filed complaint and issued summons.	
02-24-76	2) Filed deft., Price Waterhouse & Co.'s interrog. to pltf.	
02-27-76	3) Filed defts' Marine-Midland, John L. Hettrick and David J. Laub's interrog. 1st set to plaintiff.	
03-03-76	4) Filed stip. and order ext. time of deft. Price Waterhouse & Co. to answer to 4-1-76. -- Metzner, J.	
02-26-76	5) Filed ANSWER OF DEFENDANTS Marine Midland Banks, Inc. John L. Hettrick and David J. Laub.	55
03-29-76	6) Filed stip. and order ext. pliffs time to respond to interrog. of deft. Marine Midland Banks, Inc. to 4-26-76. -- Metzner, J.	
03-31-76	7) Filed stip. and order ext. deft. Price Waterhouse & Co.'s time to answer to 5-1-76. -- Metzner, J.	
04-07-76	8) Filed summons and Marshals returns - served: Gerald C. Saltarelli - 2-9-76 John Winkle 3-12-76 James P. Lewis 3-17-76 David H. Northrup 3-19-76 William H. Wendel 2-23-76 Felix E. Larkin 2-24-76 Cornelius W. Owens UNABLE TO SERVE James W. McKee, Jr. 2-21-76 Northrup R. Knox 2-05-76 John L. Hettrick 2-9-76 Allen H. Neunarth 2-17-76 Marine Midland Banks, Inc. - 2-5-76 David J. Laub 2-13-76 Charles A. Winding 2-09-76 Gerald B. Zornow 2-10-76 Paul A. Schoelkopf 2-06-76 Edward W. Duffy 2-10-76 William A. Lyons 2-04-76 Ulric Haynes, Jr. c/o Marine Midland Bank -- NOT WITH MARINE MIDLAND BANK -- 2-3-76 Nathan R. Owen UNABLE TO SERVE Price Waterhouse & Co. 2-09-76 John S. Lawson UNABLE TO SERVE -- not with Marine Midland Bank. Robert W. Hubner UNABLE TO SERVE -- not with Marine Midland Bank. Clifton W. Thaler UNABLE TO SERVE (returned for better address)	
04-29-76	9) Filed by defts Marine Midland Banks, Inc., John L. Hettrick and David J. Laub, a 1st. and notice of motion dismissing this action as a class action. - ret. 5-11-76	
04-29-76	10) Filed defts Marine Midland Bank, et al's memorandum in support of motion to dismiss as class action.	
05-03-76	11) Filed deft. Price Waterhouse & Co. notice of motion for an order dismissing the action as a class action and granting such other relief rec. 5-11-76	
05-03-76	12) Filed deft. memorandum in support of its above motion pursuant rule 11A (d)	
05-04-76	13) Filed stip. and order that if pliffs serve its answers to the interrog. (set 1) of deft. Price, said deft. will not move to compel. Deft. Price Waterhouse & Co. time to answer complaint is ext. to 6-12-76 -- Metzner, J.	

DATE	PROCEEDINGS	Date of Judgment
	14)	
04-30-76	Filed stip. and order ext. pltf's time to respond to interrog. to 5-26-76. -- Metzner, J.	
05-07-76	15) Filed pltf's affdvt. of Eric L. Krizan in opposition to motion to dismiss.	
05-07-76	16) Filed pltf's memorandum in opposition to motion to dismiss.	
05-11-76	17) Filed reply memorandum of certain defts in support of motion to dismiss pltf's class allegations.	
05-11-76	18) Filed reply memorandum of deft. Price Waterhouse & Co. in support of its motion.	
05-24-76	19) Filed on behalf of defts James W. McKee, affdvt. of Ronald M. Meister in support of motion to dismiss.	
05-27-76	20) Filed response to interrog. of defendants Marine Midland Banks, Inc. al. First set. (response of pltf.)	
05-27-76	21) Filed pltf's response to interrog. set No. of deft. Waterhouse Co.	
06-11-76	22) Filed pltf's first request for production of documents.	
06-23-76	23) Filed stip. and order that the time of deft. Price Warehouse & Co. to answer complaint is ext. to 7-12-76. -- Metzner, J.	
07-14-76	24) Filed deft. Marine Midland Banks, Inc.'s response to pltf's first request for production of documents.	
07-16-76	25) Filed stip. and order ext. time for Price Waterhouse Co. to respond to pltf's request for production to 7-27-76.-- Metzner, J.	
7-18-76	26) Filed stip. and order that the time of deft. Price Waterhouse & Co. to answer complaint is ext. to Sept. 9, 1976 and their time to answer pltf's 1st request for production of documents is ext. to Sept. 10, 1976. So ordered, Metzner, J.	
8-6-76	Filed memo chd on motion for summary judgment. This motion is granted, see opinion of companion motion. So ordered, Metzner, J. m/n	
08-06-76	27) Filed OPINION 4/1/922 defts Marine Midland Banks, Inc. and Price Waterhouse & Co. move to dismiss this action as a class action. The action is dismissed as a class action but of course may be maintained as an individual action. So ordered. -- Metzner, J. m/n	
09-02-76	28) Filed pltf's notice of appeal to the USCA for the 2nd Circuit from order dismissing this action as a class action. m/copies.	
09-14-76	29) Filed stip. and order ext. time for deft. Price W. to answer to 11-9-76.	
09-21-76	30) Filed stip. and order ext. defts Knox, et. al's time to answer to plaintiff's first request for production of documents to 10-26-76. -- Metzner, J.	
09-24-76	31) Filed notice that the record on appeal has been certified and transmitted to the USCA for the 2nd Circuit.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNE K. UNGER,

Plaintiff,

-against-

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. WARD FOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETRICK, ROBERT W. HUBNER,
NORTHRUP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON,
JAMES P. LEWIS, SOL M. LINOWITZ,
WILLIAM A. LYONS, JAMES W. MCKEE, JR.,
ALLEN H. NEUHARTH, DAVID H. NORTHRUP,
NATHAN R. OWEN, CORNELIUS W. OWENS,
CLIFTON W. PHALEN, GERALD C. SALTARELLI,
PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL,
JOHN WILKIE, CHARLES A. WINDING, GERALD
B. ZORNOW, MARINE MIDLAND BANKS, INC.
and PRICE WATERHOUSE & CO.,

Defendants.

COMPLAINT

CLASS ACTION

PLAINTIFF DEMANDS
A TRIAL BY JURY

Plaintiff, by her attorneys, Wolf Popper Ross Wolf & Jones, alleges, upon information and belief, except as to paragraph "3" which is alleged upon knowledge, as follows:

1. This action arises under the Securities Exchange Act of 1934, as amended, 15 U.S.C.A. Sections 78(a) et seq. (the "Exchange Act"), and the common law. Jurisdiction is conferred upon this Court by Section 27 of the Exchange Act, 15 U.S.C.A. Section 78(aa), and the principles of pendent jurisdiction. Certain of the acts complained of herein occurred within the Southern District of New York.

CLASS ACTION ALLEGATIONS

2(A). Plaintiff brings the present action on behalf of the class hereinbelow described, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

(B). The class consists of all persons similarly situated who purchased the stock of defendant Marine Midland Banks, Inc. ("Marine Midland") during the period of wrongful conduct alleged hereinbelow, and who have suffered damages as

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the result thereof.

(C). There are thousands of persons who are members of the class, located in various parts of the United States, and abroad. As a result, joinder of all class members is impracticable.

(D). Plaintiff will fairly and adequately protect the interests of the class inasmuch as she is a member of the class and her claims are typical of the claims of all class members. Plaintiff's interest is to obtain relief for herself and for the class for the violations of law set forth herein.

(E). The common questions of law and fact include (a) whether there has been a plan and scheme and common course of conduct to conceal from the public material facts about the true financial condition and outlook of Marine Midland, particularly with respect to its earnings and projected earnings, actual, probable and projected losses, lending practices and policies, investment policies and practices and problems and incipient threats affecting its earnings, financial condition and capital arising therefrom; (b) whether the information disseminated by the defendants to the public during the relevant period, including financial statements certified by Price Waterhouse & Co., contained untrue statements of material fact and/or omitted to disclose all material facts relating to the foregoing; (c) whether defendants, by the dissemination of misleading information and/or the failure to disclose material information, or otherwise, manipulated and inflated the price of Marine Midland stock; (d) whether by such conduct defendants have violated Section 10(b) of the Exchange Act, Rule 10b-5 promulgated thereunder, and applicable principles of common law, and are liable to plaintiff and the class.

(F). The questions of fact and law that are common

to the class predominate over questions affecting only individual members.

(G). A class action is superior to other available methods for the fair and efficient adjudication of the controversy. It would be impractical and undesirable for each of the members of the class who have suffered damages to bring separate actions in various parts of the country. In addition, should they do so, it would put a substantial burden on the courts, while a single class action can determine the rights of all class members with judicial economy.

SUBSTANTIVE ALLEGATIONS

3. Plaintiff purchased shares of the common stock of Marine Midland in or about August 1974, during the period that the wrongs complained of herein were committed and continued.

4. Marine Midland is a corporation organized and existing under the laws of the State of Delaware, and is a bank holding company, registered as such pursuant to the Federal Bank Holding Company Act of 1956. Until in or about January 1976, Marine Midland was a multi-bank holding company, owning all, or virtually all, the securities of ten constituent banks, since merged into a single bank. In addition, directly and through subsidiaries, it has engaged in such other banking and bank-related activities as mortgage banking; investment banking; equipment leasing; the underwriting, trading and distributing of state, municipal and federal agency securities; the operation of a consumer credit card company; and similar activities. Through its constituent banks, Marine Midland has operated approximately 315 banking offices in approximately 209 communities in the State of New York. In addition, through Marine Midland Bank-New York, it has maintained branch banking offices in Europe, Asia, the Caribbean region and other foreign countries and areas; and has

maintained equity interests in various financial institutions located throughout the world. Marine Midland does business throughout the State of New York, including the Southern District of New York.

5. At all relevant times, the common stock of Marine Midland was listed and traded on the New York Stock Exchange and on other national and regional securities exchanges. As of December 31, 1974, there was issued and outstanding approximately 12,512,000 shares of the common stock of Marine Midland, owned or held by more than 43,000 shareholders.

6. The individual defendants named herein are, or were at times material hereto, the directors of Marine Midland. Defendants Edward W. Duffy, John S. Lawson and John L. Hettrick are, or were, the principal executive officers thereof.

7. Defendant Price Waterhouse & Co. ("Price Waterhouse") is a partnership engaged in the practice of accounting, which holds itself out as being especially competent and reliable in matters concerning its profession. It acted as the auditors for Marine Midland during the relevant period.

8. Since in or about 1973, and continuing to date, the defendants have engaged in a scheme, plan and continuous course of conduct to present a falsely inflated and optimistic picture of Marine Midland's operations, earnings, earnings prospects and financial condition and to conceal various significant and material facts relating to the foregoing, and affecting Marine Midland's operations, earnings, earnings prospects and overall financial condition, from the investing public, including plaintiff and others similarly situated. As part of said scheme, plan and course of conduct, the defendants undertook the acts hereinafter set forth.

9. Since in or about 1973, the defendants knew, were reckless in failing to know or ascertain, or should have known,

among other things, the following:

(A) During 1973 and 1974, and continuing to date, according to standards established by the Federal Reserve Board ("FRB") and other cognizant regulatory authorities, Marine Midland, including its major constituent banks, was experiencing a deterioration of the quality of its assets, was under-capitalized and becoming increasingly under-capitalized, and was threatened with serious liquidity problems. These problems were caused, inter alia, by excessively rapid expansion of its operations and of its loan portfolio, the making of speculative loans, and excessive leveraging of its capital and financial position. Such problems were of such a degree and magnitude that, in accord with standards established by the FRB, Marine Midland had been classified as a bank-holding company requiring close scrutiny, and as having "more serious" problems, as compared to other bank-holding companies. During 1973 and 1974, the condition of Marine Midland's largest constituent banks, Marine Midland-New York and Marine Midland-Western, was one of continuing deterioration with regard to these and related problems and conditions.

(B) Marine Midland's ability to deal with its under-capitalization and related difficulties and those of its constituent banks was impaired by an existing heavy debt structure and by existing indenture covenants which seriously limited the amount of new long-term debt which could be raised by Marine Midland.

(C) Marine Midland had used, and was continuing to use, purchased funds in order to meet both liquidity requirements and loan commitments. This practice had been maintained to a degree causing criticism and concern on the part of cognizant regulatory authorities, including FRB.

(D) During the period material hereto, according to the standards established by FRB and other cognizant regulatory authorities, Marine Midland, including certain of its major constituent banks, to wit, Marine Midland-New York and Marine Midland-Western, had capitalization which was inadequate in relation to risk assets, marginal and inferior quality assets and deposits. These inadequacies were sufficient to cause examining authorities to assign "ratings" to said banks, indicating substantial deficiencies in this area. Marine Midland has failed to take adequate measures to correct or ameliorate these problems so that their magnitude and seriousness have continued to increase.

(E) During the relevant period and particularly from 1973 to date, Marine Midland and its major constituent banks have had an unacceptable and even dangerous amount of "problem loans" in their loan portfolios. According to standards established by the FRB, the problem loans of Marine Midland-New York have reached and exceeded an amount equal to 100% of its capital.

(F) Marine Midland has had excessive and risky resort to the issuance of commercial paper as a vehicle for meeting its funding needs, to such an extent that commercial paper outstanding has greatly exceeded its reliable lines of credit. As of June, 1974, it had outstanding approximately \$214 million of such commercial paper. As of January, 1975, it had approximately \$142 million of such paper, as against only \$107 million of identifiable lines of credit.

(G) During the relevant period, Marine Midland had made, had continued to hold, or had made commitments for, hundreds of millions of dollars in highly speculative and risky loans to real estate investment trusts ("REITs"); the outstanding balance of which loans amounted to approximately \$212 million as of December 31, 1974, and a similar sum as of December 31, 1973. The amounts so loaned or committed amounted to more than one-half of Marine Midland's total common shareholders' equity, and approximately half of its total capital, as of both December 31, 1973 and December 31, 1974. Throughout the relevant period, there has been a major and continuing deterioration of this substantial portion of Marine Midland's loan portfolio. A large proportion of said loans are, and have been, in default as to principal or interest or both. Marine Midland has been required to extend and restructure the terms of numerous of said loans, resulting in both actual and potential loss of both principal and interest income. Many, if not most, of the REITs to which such loans have been made are in extremely precarious financial condition, if not actually insolvent, thus rendering highly doubtful recovery of the principal loaned as well as any recovery of interest due or past due. Even as to such loans as are secured by interests in or liens upon REIT assets, said assets do not have sufficient present or potential market value to secure the outstanding loan amounts. In addition, through the practice of restructuring, extending and renegotiating loans, and the practice of continuing to accrue income with respect to interest on such loans until they are 60 days in default, and otherwise, Marine Midland has avoided the recognition of loss of principal or income as to many such loans, notwithstanding that such losses should have been recognized as having occurred, and/or

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being substantially likely to occur, within the foreseeable future. Under the circumstances prevailing at times relevant herein, it is, and has been, reasonably foreseeable that Marine Midland will incur losses, and will eventually be forced to write off and recognize losses, of \$30,000,000 or more, attributable to its loans to the real estate investment trust industry.

(H) During the relevant period, Marine Midland has invested, and has continued to invest, heavily in the debt obligations of states and other political subdivisions of the United States, including the City of New York, the State of New York, and other political subdivisions thereof. On an adjusted cost basis, investments in the securities of states and political subdivisions amounted to approximately \$693,433,000 as of December 31, 1973 and approximately \$658,044,000 as of December 31, 1974. At all relevant times, the sums so invested have exceeded Marine Midland's total capital and shareholders' equity by more than \$200,000,000. Due to the deteriorating financial condition of many of said states and political subdivisions, the making and continuation of such investments has become increasingly risky and speculative, and it has for some time been reasonably foreseeable that the issuers of certain of such obligations would default upon them, or otherwise be unable to make payment of principal or payment of interest when due. Moreover, particularly due to Marine Midland's position as a major underwriter and marketer of such obligations, it had, or had available to it, information showing the increased risks of investments in such securities and the probability of default or other non-payment thereon. There has been, and continues to be, a significant probability that Marine Midland will incur losses of many millions of dollars due to the failure of issuers of such securities to meet interest payments, and/or their default in repayment of such obligations when due, as well as the

deferral of the repayment and the reduction of interest rates on such obligations as are not actually defaulted; such exposure amounting to as much as \$60,000,000 or more.

(I) During the relevant period, Marine Midland has rapidly expanded its foreign operations, with a corresponding increase in its loans which were made to, or guaranteed by, foreign governments or governmental agencies. A substantial proportion of such loans and other foreign loans made to business enterprises, are and have been highly risky and speculative, in that many of them were made to governments, government agencies and enterprises in the so-called lesser-developed countries, and have been made and carried under circumstances such that there is a strong likelihood of default in interest payments or in timely or even eventual repayment of principal. The risks involved in such lending have been significantly increased by the deteriorating financial condition of such lesser developed countries and business enterprises therein, occasioned to a substantial degree by the economic developments of the past two, three years relating to the supply and price of oil.

(J) During the relevant period, Marine Midland, particularly through subsidiaries of Marine Midland-New York, entered into and/or held highly risky and speculative equity interests in a London merchant bank, International Marine Banking Co., Ltd. ("Intermarine") and other financial institutions in such nations as Brazil, Colombia, Hong Kong, Ireland, Panama, the Philippines, Turkey and Venezuela. Numerous of such investments were so speculative and improvident that it was reasonably foreseeable that they would result in substantial losses to Marine Midland. Inter alia, as was not revealed until sometime in 1975, the aforementioned London merchant bank was financially unsound and had engaged in investment practices which were likely to, and did, result in

substantial loss of capital and in the necessity of making substantial loan write-offs and provisions for future write-offs. While the said London merchant bank was carried by Marine Midland at an asset value of approximately \$1 billion, the true value of its assets was no more than \$300 million.

(K) During the relevant period, Marine Midland entered into numerous other loans that were highly speculative, risky and improvident and that were likely to show, and did show, high delinquency and default rates, including real estate construction and development loans, consumer installment and credit card loans, and the like.

(L) With respect to each of the categories of loans and investments above mentioned, defendants adopted and followed policies and practices, including accounting policies and practices that were designed to, and did, avoid unreasonably the recognition and accrual of losses, the reporting of potential and probable losses and the writing down or writing off of assets that had deteriorated in value or that had lost their value.

(M) During the relevant period, Marine Midland made inadequate charges against income for provision for loan losses and had inadequate total reserves for possible loan losses, in that, inter alia, charges against income for loan loss provision were made on the basis of a five year moving average of loss experience that did not accurately or adequately reflect actual losses or potential losses in the light of the matters set forth hereinabove, or in the light of economic conditions prevailing during the relevant period.

10. In order to present a false and inflated picture of the operations, earnings, prospects and financial condition of Marine Midland, defendants concealed and failed to make proper and timely disclosure of the matters referred to in Paragraph "9" hereinabove.

11. While defendants were concealing and failing to disclose to the investing public the aforementioned information, they were, during the same period, issuing false and misleading statements and reports to the public, which they knew, or were reckless in failing to know or ascertain, or should have known to be such, including the following:

(A) In Marine Midland's 1973 Annual Report, issued in or about January, 1974, defendants stated:

"We expect better earnings performance in 1974."

In the light of the matters set forth in Paragraph "9" hereinabove, there was no reasonable basis for this statement.

(B) In the aforesaid 1973 Annual Report, defendants stated:

"Our largest single investment in international banking is a London merchant bank founded in 1971, International Marine Banking Co., Ltd., (Intermarine). On December 31, 1973, Intermarine had assets in excess of \$1,000,000,000. It contributes significantly to Marine Midland's earnings."

This statement was false and misleading in that it overstated the real value of Intermarine's assets, and in that it concealed the unsound condition of Intermarine's capital structure as well as the risky and highly speculative nature of its investments and other commitments. In addition, the statement was misleading in the light of matters set forth in Paragraph "9" hereinabove.

(C) The said 1973 Annual Report was false and misleading in its discussion (at page 19) of the manner of determining the carrying value of securities held for investment and securities carried in trading account in that, inter alia, it failed to reveal whether, and to what extent, securities had been transferred from the trading account to the investment account in order to avoid recognition of market value decline.

(D) The said 1973 Annual Report (at page 19) was false and misleading in its discussion of accounting policies relative to reserves for possible loan losses, in stating:

"The provision for possible loan losses charged to current operations . . . is computed by applying the ratio of net loan losses to average loans outstanding for the most recent five years to average loans outstanding during the current year. Additional provisions may be made from time to time for such factors as changes in the character of the loan portfolio and economic conditions."

This statement was false and misleading in that, inter alia, it concealed that the five year moving average method wholly failed to require adequate provisions for loan losses under economic conditions prevailing during the period material herein, and further, in that it falsely represented that adequate additional provisions were made to reflect the status of the loan portfolio and the prevailing economic conditions during that period.

(E) The said 1973 Annual Report, and the financial statements contained therein, were further false and misleading in that, in reporting total assets of approximately \$13 billion, net income of approximately \$45.8 million, net income per share of \$3.65, and total common shareholders equity of approximately \$403.2 million, said report failed to clearly and adequately disclose the effect on those figures of the deterioration in value of Marine Midland's

holdings of state and municipal securities. Said securities were carried at a value of approximately \$53 million in excess of their actual market value as of December 31, 1973.

(F) The said 1973 Annual Report, and the financial statements contained therein, were further false and misleading in that the provision for loan losses charged against operating income, as well as the total reserve for loan losses carried on the balance sheet, were wholly and grossly inadequate. Only approximately \$19.5 million was charged against income for potential loan losses, although loans in excess of \$20.2 million were actually charged off during 1973, and loans in excess of \$23.6 million had been charged off during 1972. Despite the deteriorating condition of the economy, and the deteriorating financial condition of Marine Midland, the total balance sheet reserve for potential loan losses was increased by only approximately \$686,000 in 1973. Under the circumstances then prevailing, the statement, in the 1973 Annual Report, that:

"For the years 1973 and 1972 no additional provision was required for such factors as changes in the character of the loan portfolio and economic conditions,"

was grossly false and misleading.

(G) The said 1973 Annual Report including the financial statements contained therein, was further false and misleading in that no mention whatever was made of the increasingly serious problems or incipient or actual losses arising out of Marine Midland's REIT loans.

(H) Marine Midland's 1974 Annual Report, including the financial statements contained therein, was false and misleading in that, inter alia, it reported total assets of approximately \$12.6 billion, total common shareholders equity of approximately \$422.9 million, net income of approximately \$40.1 million, net income per

common share of \$3.20, and book value per common share of \$33.88. These figures were false and misleading in that they failed to reflect the matters set forth in Paragraph "9" hereof, and particularly that they failed to reflect, or to adequately reflect, the more than \$100 million difference between the carrying value and the market value of Marine Midland's investment securities portfolio, the clearly foreseeable and actual losses arising out of Marine Midland's REIT loans, the reasonably foreseeable substantial losses of Intermarine, and the deterioration in value of other Marine Midland assets.

(I) The said 1974 Annual Report was further false and misleading in that it represented that sufficient "extra provisions" had been made for possible future loan losses, and that the sufficiency of such provision was indicated by the fact that loan loss provision charges against income exceeded actual 1974 net loan charge-offs. This statement was false and misleading, particularly in the light of the rapid increase in loans charged off between 1972 and 1974, the inadequacy of prior charges for possible loan losses in the light of actual prior experience, and the by then clear foreseeability of major additional loan and other losses.

(J) The 1974 Annual Report, and particularly the income statement contained therein, was further false and misleading in that it failed to reveal the extent to which greater declines in net income than were reported had been avoided by continuing to invest in tax-exempt securities of states and municipalities, despite the increasing, and obvious, risks pertaining to such investments.

(K) The notes to the consolidated financial statements contained in the aforesaid 1974 Annual Report, in discussing reserves for possible loan losses, states:

"The 1974 provision charged to operating expenses includes \$4,100,000 in excess of the minimum required for the constituent banks by application of the five year formula, and \$2,717,000 in excess of actual 1974 net charge-offs incurred by certain other affiliates. Management deemed this additional amount was necessary to adequately reflect the increased risk characteristics of the loan portfolio and in light of current economic conditions."

This statement was false and misleading in that, at the time it was made, it was, or should have been, clear that substantial additional provisions should have been made for losses which should have been recognized during 1974, or which clearly would have to be recognized within a short time thereafter.

12. During the relevant period, Price Waterhouse, in certifying the financial statements of Marine Midland for said periods, represented that it was its opinion that the financial statements of Marine Midland for such periods fairly represented the operations and financial position thereof; when in fact said financial statements did not fairly present the true state of Marine Midland's operations or its financial condition and were materially false and misleading for the reasons stated hereinabove. Defendant Price Waterhouse knew, was reckless in failing to know or ascertain, or should have known, all of the foregoing.

13. During the period in question, defendants issued, or allowed to be issued, disseminated and circulated to the public, or aided and abetted in the issuance, dissemination or circulation of false and misleading statements and reports, filed or allowed to be filed, false and misleading reports with the New York Stock Exchange, the Securities and Exchange Commission and other governmental agencies, in that the reports failed to disclose the afore-

mentioned material facts and contained false and misleading statements with respect to the operations, assets, earnings and financial condition of Marine Midland.

14. By reason of their failure to disclose the aforementioned material information relating to the operations, assets and earnings of Marine Midland and its issuance of false and misleading statements and reports relating thereto, defendants have manipulated and artificially inflated the price of the securities of Marine Midland during the period since in or about 1973.

15. As a result of the above-described acts of defendants, they directly and indirectly, by the use of the mails and means and instrumentalities of transportation and communication in interstate commerce, have violated, and/or aided and abetted in, violations of Section 10(b) of the Exchange Act, Rule 10b-5 promulgated thereunder, in that they (a) employed devices, schemes and artifices to defraud, (b) made untrue statements of material facts or omitted to state material facts necessary in order to make statements made in light of the circumstances under which they were made not misleading, or (c) engaged in acts, practices and a course of business that operated as a fraud or deceit upon plaintiff and others similarly situated in connection with their purchases of Marine Midland securities during the aforementioned period.

16. During the period since in or about 1973, plaintiff and others similarly situated, in reliance upon the aforesaid false and misleading statements relating to the operations, assets and earnings of Marine Midland, in reliance upon the integrity of the market, and in the absence of the aforesaid material information concerning the operations, assets and earnings of Marine Midland that the defendants concealed and failed to disclose, bought securities of Marine Midland. If plaintiff and others

similarly situated had known the true facts concerning Marine Midland, they would not have purchased said securities at the prices that they paid. At the time of the purchases by plaintiff and others similarly situated of said stock, the fair market value of Marine Midland's securities was substantially less than the prices paid by plaintiff and others similarly situated.

17. By reason of the wrongs described herein, defendants have committed common law fraud upon plaintiffs and have otherwise breached their common law duties toward plaintiff and other members of the class similarly situated.

18. By reason of the wrongs described herein, plaintiff and all others similarly situated have been damaged as a result of their purchases of Marine Midland's securities.

WHEREFORE, plaintiff prays for the following relief:

(A) That plaintiff and all other persons similarly situated have judgment against defendants, in the amount of damages that they have sustained, with interest thereon;

(B) That plaintiff be allowed the costs and expenses of this action, including reasonable attorneys' and accountants' fees;

(C) That plaintiff have such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 29, 1976

WOLF POPPER ROSS WOLF & JONES

By: 

A Member of the Firm
Attorneys for Plaintiff
Office and P.O. Address
845 Third Avenue
New York, New York 10022
(212) 759-4600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNE K. UNGER,

Plaintiff,

-against-

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. WARD FOSWAY, ULRIC HAYNES, JR.,
JOHN L. HETTRICK, ROBERT W. HUBNER,
NORTHRUP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON,
JAMES P. LEWIS, SOL M. LINOWITZ,
WILLIAM A. LYONS, JAMES W. MCKEE, JR.,
ALLEN H. NEUHARTH, DAVID H. NORTHRUP,
NATHAN R. OWEN, CORNELIUS W. OWENS,
CLIFTON W. PHALEN, GERALD C. SALTARELLI,
PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL,
JOHN WILKIE, CHARLES A. WINDING, GERALD
B. ZORNOW, MARINE MIDLAND BANKS, INC.
and PRICE WATERHOUSE & CO.,

Defendants.

W.F.
2/23/76
diary
76 Civ. 481 (CMM)

INTERROGATORIES
TO PLAINTIFF

SET NO. 1

Defendant Price Waterhouse & Co. (Price Waterhouse)
hereby demands that plaintiff Anne K. Unger separately and
fully answer in writing under oath within 30 days after service
hereof, pursuant to Rule 33 of the Federal Rules of Civil
Procedure, each of the following interrogatories:

Definitions and Instructions

A. As used herein, the term "document" means any
written, taped, recorded or graphic matter however produced

or reproduced, including any tapes, recordings or other forms of mechanical or electronic reproduction, together with any attachments and annotations thereto or thereon, and any and all non-identical copies and all drafts of such matter.

B. As used herein, the term "person" means the plural as well as the singular and includes any natural person and any firm, corporation, association, joint venture, partnership or other entity.

C. References preceded by the word "identify" and referring to:

(1) a natural person or persons, as defined herein, require a statement as to the full name and address of last known residence and principal place of business of each such person, and a description of their business affiliation and position during the period to which the interrogatory refers;

(2) a business organization or entity, require a statement as to the full name of such organization or entity, the address of its principal place of business and a description of the nature of its business during the period to which the interrogatory refers; and

(3) documents require a statement as to:

(a) the type of document, its date and stated subject or general subject matter;

(b) the full name, address and position of the person in charge of preparing each such document and of the person who signed each such document;

(c) the date or dates of preparation thereof;

(d) the full name and position of each person to whom such item of written matter was distributed; and

(e) the full name and last known address of each person who presently has custody, control or possession thereof.

D. As used herein, "Marine Midland" means Marine Midland Banks, Inc., its predecessors, subsidiaries and affiliates.

E. Wherever an interrogatory asks for the identity of any document, plaintiff may in lieu of complying with Instruction (C), produce the document for inspection and copying with an identification of the interrogatory to which it responds.

INTERROGATORIES

1. Set forth in full the name, age, marital status and address of plaintiff and the period for which she has resided at that address.

2. Set forth in full (a) the nature of the plaintiff's business, profession, or occupation; (b) the period for which she has been engaged in said business, profession or occupation; (c) the nature of any business, profession or occupation previously engaged in by plaintiff; and (d) the period for which she was previously engaged in such business, profession or occupation.

3. Set forth in full the educational background and professional training of the plaintiff.

4. Set forth the full name and current business address of each person with whom plaintiff is professionally related, employed by or affiliated with in any business, profession or occupation practiced by her.

5. Set forth fully with respect to plaintiff:

(a) the number and type of shares of Marine Midland common stock purchased;

(b) the trade date(s) on which such shares were purchased;

(c) the number of shares purchased on each such date;

(d) the price paid for the shares purchased on each such date;

(e) the name and address of the broker, if any, through whom each such purchase was made;

- (f) the name and address of the holder of record of the shares purchased on each such date;
- (g) the number(s) of the certificate(s) representing the shares purchased on each such date;
- (h) the number of shares of Marine Midland sold;
- (i) the trade date(s) on which such sales occurred;
- (j) the number of shares sold on each such date;
- (k) the price at which the shares sold on each such date were sold;
- (l) the name and address of the broker, if any, through whom each such sale was made;
- (m) the name and address of the holder(s) of record of such shares;
- (n) the number(s) of the certificate(s);
- (o) the number of shares of Marine Midland common stock presently held by plaintiff; and
- (p) the name and address of the holder(s) of record of such shares.

6. Set forth as to plaintiff with respect to any type of stock, debenture, bond, put, call or security or security interest of Marine Midland other than common stock the information called for in Interrogatory 5(a) - (p).

7. Identify each person who participated on behalf

of plaintiff in the decision to make each purchase and each sale identified in response to Interrogatories 5 and 6.

8. Identify each member of the class which plaintiff purports to represent in this action who has communicated directly or indirectly, either personally or through a representative, with the plaintiff or her attorney, in connection with any of the claims asserted on behalf of the alleged class.

9. With respect to each person identified in response to Interrogatory 8, set forth in full the information as to Marine Midland common stock and any other type of stock, debenture, bond, put, call or security or security interest of Marine Midland called for in Interrogatory 5(a) - (p).

10. Identify all documents evidencing any information considered by plaintiff, and/or by any person acting on behalf of plaintiff, in deciding whether to buy and/or sell (a) Marine Midland common stock; and (b) any other type of stock, debenture, bond, put, call or security or security interest of Marine Midland.

11. Identify all documents evidencing any discussion(s) involving representatives of plaintiff regarding the purchase or sale of (a) Marine Midland common stock; and (b) any other type of stock, debenture, bond, put, call or security

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or security interest of Marine Midland.

February 23, 1976

CRAVATH, SWAINE & MOORE,

by


A Member of the Firm

Attorneys for Defendant
Price Waterhouse & Co.,
One Chase Manhattan Plaza,
New York, N. Y. 10005
Tel.: (212) 422-3000

To:

MESSRS. WOLF POPPER ROSS WOLF & JONES,
Attorneys for Plaintiff,
845 Third Avenue,
New York, N. Y. 10022

MESSRS. SULLIVAN & CROMWELL,
Attorneys for Defendant
Marine Midland Banks, Inc.,
48 Wall Street,
New York, N. Y. 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WF
2/25/72

----- x
ANNE K. UNGER;

Plaintiff,

-against-

: 76 Civ. 481
(CMM)

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. WARD FOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETTRICK, ROBERT W. HUBNER,
NORTHRUP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON, JAMES
P. LEWIS, SOL M. LINOWITZ, WILLIAM A.
LYONS, JAMES W. MCKEE, JR., ALLEN H.
NEUHARTH, DAVID H. NORTHRUP, NATHAN
R. OWEN, CORNELIUS W. OWENS, CLIFTON
W. PHALEN, GERALD C. SALTARELLI, PAUL
A. SCHOELLKOPF, WILLIAM H. WENDEL,
JOHN WILKIE, CHARLES A. WINDING,
GERALD B. ZORNOW, MARINE MIDLAND
BANKS, INC. and PRICE WATERHOUSE & CO.,

: ANSWER

Defendants.
----- x

Defendants Marine Midland Banks, Inc., John L.
Hettrick and David J. Laub, by their attorneys, Sullivan
& Cromwell, for their answer to the complaint herein:

1. Deny the allegations in paragraph 1, except
admit that plaintiff purports to bring action under the
Securities Exchange Act of 1934, as amended, and the common
law, and claims jurisdiction on the basis of Section 27
of that Act and principles of pendent jurisdiction.

2. Deny the allegations in paragraph 2, except
admit that plaintiff purports to bring action in behalf of
an alleged class and pursuant to Rule 23(b)(3) of the
Federal Rules of Civil Procedure.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3.

4. Deny the allegations in paragraph 4, except admit that Marine Midland Banks, Inc. is a corporation organized and existing under the laws of Delaware, that it is a bank holding company registered pursuant to the Federal Bank Holding Company Act of 1956, as amended, that for some years prior to January 1, 1976, Marine Midland Banks, Inc. was a multi-bank holding company, that as of January 1, 1976 ten former subsidiary banks were merged into a single new bank and that Marine Midland Banks, Inc., through subsidiaries, has engaged in various banking activities, including activities in the State of New York and in the Southern District of New York.

5. Admit the allegations in paragraph 5, except aver that as of December 31, 1974, there were issued and outstanding approximately 12,483,000 shares of common stock owned or held by approximately 45,400 shareholders.

6. Deny the allegations in paragraph 6, except admit that the named individual defendants are or have been directors of Marine Midland Banks, Inc. and that defendants Duffy, Hettrick, Laub and Lawson are or have been officers of Marine Midland Banks, Inc.

7. Deny the allegations in paragraph 7, except admit that Price, Waterhouse & Co. is a partnership engaged in the practice of accounting which holds itself out as being competent and reliable in matters concerning its profession and that it has acted as auditors for Marine Midland Banks, Inc. since before 1973.

8. Deny the allegations in paragraphs 8 through 18 and each such defendant specifically denies participating in any plan, scheme or course of conduct or doing anything else in violation of the Securities Exchange Act of 1934 or rules promulgated thereunder or of common law.

AFFIRMATIVE DEFENSE

9. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendants pray for an order dismissing the complaint, awarding them their costs and expenses of this action, including reasonable attorneys' and accountants' fees, and such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
February 24, 1976

SULLIVAN & CROMWELL

By John Dickey
(A Member of the Firm)

Attorneys for Marine Midland
Banks, Inc., John L. Hettrick
and David J. Laub

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
ANNE K. UNGER,

Plaintiff,

-against-

: 76 Civ. 481
(CMM)

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. WARD FOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETTRICK, ROBERT W. HUBNER,
NORTHRUP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON, JAMES
P. LEWIS, SOL M. LINOWITZ, WILLIAM A.
LYONS, JAMES W. MCKEE, JR., ALLEN H.
MEUHARTH, DAVID H. NORTHRUP, NATHAN
R. OWEN, CORNELIUS W. OWENS, CLIFTON
W. PHALEN, GERALD C. SALTARELLI, PAUL
A. SCHOELLKOPF, WILLIAM H. WENDEL,
GERALD B. ZORNOW, MARINE MIDLAND BANKS,
INC. and PRICE WATERHOUSE & CO.,

Defendants.

----- x

: NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the Complaint and
Answers herein, the affidavit of John Dickey, sworn to
April 28, 1976, and all other proceedings had herein, de-
fendants Marine Midland Banks, Inc., John L. Hettrick and
David J. Laub will move this Court at a stated term for
motions, to be held at Room 2201 of the United States Court-
house, Foley Square, New York, New York, on May 11, 1976 at
10:00 a.m. or as soon thereafter as counsel can be heard, for
an order pursuant to Civil Rule 11A of the Local Rules of
this Court dismissing this action as a class action, and

for such other and further relief as to this Court may
seem just and proper.

Dated: New York, New York
April 28, 1976

Yours, etc.,

SULLIVAN & CROMWELL

By: John Dickey
(A Member of the Firm)

Richard L. Winkler

Attorneys for Defendants
Marine Midland Banks, Inc.,
John L. Hettrick and
David J. Laub
48 Wall Street
New York, NY 10005
(212) 952-8100

TO: WOLF, POPPER, ROSS
WOLF & JONES
Attorneys for Plaintiff
845 Third Avenue
New York, NY 10022

CRAVATH, SWAIN & MOORE
Attorneys for Defendant
Price Waterhouse & Co.
One Chase Manhattan Plaza
New York, NY 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ANNE K. UNGER, :

Plaintiff, :

: 76 Civ. 481
(CMM)

-against- :

EDWARD W. DUFFY, CHARLES G. BLAINE, :
WM. WARD FOSHAY, ULRIC HAYNES, JR., :
JOHN L. HETTRICK, ROBERT W. HUBNER, :
NORTHROP R. KNOX, FELIX E. LARKIN, :
DAVID J. LAUB, JOHN S. LAWSON, JAMES :
P. LEWIS, SOL M. LINOWITZ, WILLIAM A. :
LYONS, JAMES W. MCKEE, JR., ALLEN H. :
NEUHARTH, DAVID H. NORTHRUP, NATHAN :
R. OWEN, CORNELIUS W. OWENS, CLIFTON :
W. PHALEN, GERALD C. SALTARELLI, PAUL :
A. SCHOELLKOPF, WILLIAM H. WENDEL, :
GERALD B. ZORNOW, MARINE MIDLAND BANKS, :
INC. and PRICE WATERHOUSE & CO., :

AFFIDAVIT

Defendants. :
----- X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN DICKEY, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Sullivan & Cromwell, Attorneys for defendants Marine Midland Banks, Inc., John L. Hettrick and David J. Laub ("the moving defendants"). I am familiar with the proceedings had herein and submit this affidavit in support of the within motion to dismiss this action as a class action pursuant to Local Civil Rule 11A.

2. On January 29, 1976, plaintiff filed her complaint in this action with the Clerk of the Court, alleging various claims for relief under Section 10(b) of

the Securities Exchange Act of 1934, Rule 10(b)(5) promulgated thereunder, and the common law. The complaint further alleges that plaintiff's action is brought on behalf of "all persons similarly situated" and that the action is suitable for treatment as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The complaint was served upon defendant Marine Midland Banks, Inc. on February 5, 1976.

3. On February 25, 1976, the moving defendants duly answered the complaint, denying the material allegations thereof, and served with their answer a first set of interrogatories intended to elicit from plaintiff the alleged factual bases for the various assertions in the complaint.

4. Two days earlier, on February 23, 1976, defendant Price Waterhouse & Co. also served its own set of interrogatories on plaintiff, concerned in substantial part to elicit facts relating to whether the action could properly be maintained as a class action.

5. Civil Rule 11A of the Local Rules of this Court requires that within sixty (60) days after the filing of a pleading asserting a claim for a class, the party asserting that claim must move for a determination under Fed. R. Civ. P. 23(c)(1) as to whether the action is to be maintained as a class action.

6. Since filing her complaint on January 29, 1976, plaintiff has not moved for a determination under Fed. R. Civ. P. 23(c)(1) as to whether her action is to be maintained as a class action. To date eighty-nine (89) days have passed since the filing of plaintiff's

complaint asserting a claim for a class. Accordingly, under Rule 11A(c) plaintiff is twenty-nine days in default on her obligation to move for a class determination, and the defendants are thus entitled, indeed directed, to move under Rule 11A(d) to dismiss the class allegations in the complaint.

7. Additionally, plaintiff has not yet submitted answers to the interrogatories of the moving defendants, which answers were originally due on March 26, 1976. In late March, counsel for plaintiff requested and was granted a 30-day extension of time, until April 26, 1976, to respond to those interrogatories. On April 23, 1976, counsel for plaintiff requested and received another 30-day extension, on the representation that no additional extensions would be sought.

8. Plaintiff has further failed to answer or object to the interrogatories of defendant Price Waterhouse & Co., which answers were due on March 22, 1976. I am told that plaintiff has not sought or been granted additional time to respond to those interrogatories and thus is in default. The Price Waterhouse interrogatories bore directly on whether this action should be permitted to go forward as a class action.

9. On January 10, 1976, the attorneys for plaintiff, on behalf of a plaintiff named Tanzer, filed an action, almost a carbon copy of the instant action, against Bankers Trust Co., Inc., another prominent New York bank holding company, and its directors and accountants. Although more than sixty (60) days have passed since that

lawsuit was commenced, so far as the court records show,
the attorneys for plaintiff are also in default in that
case in making the required motion under Civil Rule
11A(c).

John Dickey
John Dickey

Subscribed and sworn to
this 28th day of April, 1975.

Bruce M. Arch
Notary Public

BRUCE M. ARCH
Notary Public, State of New York
Residing in Queens County
Queens Co. CR's No. 31-4679673
Certificate Filed in
New York Co. CR's
Commission Expires March 22, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C.D.
4/28/76

ANNE K. UNGER,

Plaintiff,

-against-

76 Civ. 481
(CMM)

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. WARD FOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETTRICK, ROBERT W. HUBNER,
NORTHROP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON,
JAMES P. LEWIS, SOL M. LINOWITZ,
WILLIAM A. LYONS, JAMES W. MCKEE, JR.,
ALLEN H. NEUHARTH, DAVID H. NORTHROP,
NATHAN R. OWENS, CORNELIUS W. OWENS,
CLIFTON W. PHALEN, GERALD C. SALTERELLI,
PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL,
JOHN WILKIE, CHARLES A. WINDING, GERALD
B. ZORNOW, MARINE MIDLAND BANKS, INC.,
and PRICE WATERHOUSE & CO.,

NOTICE OF
MOTION

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the complaint, the affidavit of Andrew P. Tashman sworn to April 28, 1976, and prior proceedings herein, the undersigned will move this Court (Honorable Charles M. Metzner), at the United States Courthouse, Room 2201, Foley Square, New York, New York, on May 11, 1976, at 10:00 a.m., or as soon thereafter as counsel can be heard, pursuant to Rule 11A(d) of the Civil Rules of this Court for an order dismissing the action as a class action and granting such other and further relief

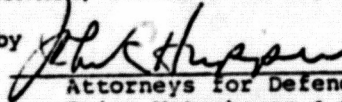
39a

as to the Court may seem just and proper, including but not limited to costs, expenses, and counsel fees incurred in making this motion.

April 28, 1976

CRAVATH, SWAINE & MOORE,

by



Attorneys for Defendant
Price Waterhouse & Co.,
One Chase Manhattan Plaza,
New York, N. Y. 10005
(212) 422-3000

ULRIC R. SULLIVAN
Of Counsel

1251 Avenue of the Americas,
New York, N. Y. 10020
(212) 489-8900


Defendants.

3. Notwithstanding the class action allegations contained in Paragraphs 2(a) (A) through 2(G) of her com-

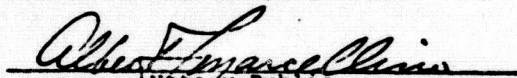
plaint, plaintiff has not served upon defendant Price Waterhouse & Co. a notice of motion for a determination under Fed. R. Civ. P. 23 (c)(1) as to whether the action is to be maintained as a class action and, if so, the membership of the class, as required by Rule 11A(c) of the Civil Rules of this Court.

4. Plaintiff's counsel has made no request of counsel for defendant Price Waterhouse & Co., nor to affiant's knowledge made any application to the Court, for a postponement of such a class action determination.

5. Civil Rule 11A(d) requires that where a class action motion has not been made by the party asserting the class action claim within 60 days of the filing of the complaint, the opposing party shall move within 30 days of the expiration of the time allowed for such motion to dismiss the action as a class action. As today, April 28, 1976, is the last day for defendant Price Waterhouse & Co. to so move, and plaintiff has yet to move for a class action determination, it is therefore appropriate that pursuant to Rule 11A(d) the action be dismissed as a class action.


Andrew P. Tashman

Subscribed and sworn to before me)
this 28th day of April 1976.)


Notary Public

ALBERT F. MARCELLINO
Notary Public, State of New York
No. 422412/00
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 20, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNE K. UNGER,

Plaintiff,

-against-

76 Civ. 481
(CMM)

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. WARD FOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETTRICK, ROBERT W. HUBNER,
NORTHROP R. KNOX, FELIX E. LARKEN,
DAVID J. LAUB, JOHN S. LAWSON,
JAMES P. LEWIS, SOL M. LINOWITZ,
WILLIAM A. LYONS, JAMES W. MCKEE, JR.,
ALLEN H. NEUHARTH, DAVID H. NORTHRUP,
NATHAN R. OWEN, CORNELIUS W. OWENS,
CLIFTON W. PHALEN, GERALD C. SALTARELLI,
PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL,
JOHN WILKIE, CHARLES A. WINDING, GERALD
B. ZORNOW, MARINE MIDLAND BANKS, INC.,
and PRICE WATERHOUSE & CO.

STIPULATION
AND
ORDER

Defendants.

IT IS HEREBY STIPULATED, without prejudice to the motions of defendants Price Waterhouse & Co., Marine Midland Banks, Inc., John L. Hettrick and David J. Laub to dismiss the above-captioned action as a class action, that if plaintiff serves its answers to the Interrogatories to Plaintiff (Set No. 1) of defendant Price Waterhouse & Co. by May 26, 1976, defendant Price Waterhouse & Co. will not move pursuant to Rule 37 for an order compelling an answer or seeking sanctions by reason of plaintiff's failure to respond prior to that date; and

IT IS FURTHER STIPULATED that the time within which defendant Price Waterhouse & Co. may move against or

14-

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answer the complaint in the above-captioned action is
extended to and including June 18, 1976.

April 29, 1976
New York, New York

WOLF POPPER ROSS WOLF & JONES,

by

James J. Ross
A member of the firm

Attorneys for Plaintiff,
845 Third Avenue,
New York, N. Y. 10022

CRAVATH, SWAINE & MOORE,

by

John L. Hanger
A member of the firm

Attorneys for Defendant
Price Waterhouse & Co.,
One Chase Manhattan Plaza,
New York, N. Y. 10005

SO ORDERED: 5-3-76

Charles W. Hanger
U.S.D.J.

C.D.
5/7/14UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ANNE K. UNGER, :

Plaintiff, : 76 Civ. 481 (CMM)

-against- : AFFIDAVIT IN OPPOSITION

EDWARD W. DUFFY, et al., : TO MOTION TO DISMISS

Defendants. :

-----x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

ERIC L. KEISMAN, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Wolf Popper Ross Wolf & Jones, attorneys for plaintiff Anne K. Unger in this action. I am familiar with all the facts material to this litigation, and submit this affidavit in opposition to the motion made by certain defendants to dismiss this action as a class action on the basis of plaintiff's failure heretofore to move for a class determination, pursuant to Rule 11A of the Civil Rules of this Court ("Rule 11A").

2. At the outset, we concede that, through inadvertence, we have failed to make a motion for class determination within sixty days of the filing of this action, as provided by Rule 11A(c), or to obtain formal postponement, by stipulation or motion, of the time for such motion. This did not occur through any intention or design to delay or to avoid the issue; but was an entirely unintentional omission. We assure the Court that there will be no repetition of such omissions, and respectfully apologize for what has occurred. This affidavit, and our accompanying Memorandum of Law, will show, however, that the extreme relief sought by the moving defendants herein -- that is, the striking of the class

action allegations of the Complaint and thus, for all practical purposes, the dismissal of the action -- are wholly inappropriate remedies for this inadvertence. We will show that this is an action that, by its very scope and nature, and by its present posture, does not lend itself to an early determination of the class action questions, but rather is one in which the class action motion and its determination should be deferred until after a substantial amount of discovery has been taken. In addition, due to both the nature and the posture of the case, our inadvertent non-compliance with Rule 11A(c) has neither burdened this Court nor imposed burdens upon or caused prejudice to any defendant. Quite the contrary, we submit that any effort to press for class action determination at this stage of the litigation would have been an imposition on the Court; would have been stoutly resisted by defendants on the grounds, among other things, of prematurity; and could have resulted under the prevailing authorities, only in either an order deferring the determination, or a denial of the motion with leave to renew at a more appropriate time.

3. This action was commenced by plaintiff on January 29, 1976, when the Complaint was filed in this Court. A copy of the Complaint is submitted herewith as Exhibit "1." The action, brought on behalf of plaintiff and "all persons similarly situated who purchased the stock of defendant Marine Midland Banks, Inc. ("Marine Midland") during the period of wrongful conduct alleged hereinbelow," charges defendants with engaging, "since in or about 1973, and continuing to date," in a "continuous course of conduct to present a falsely inflated and optimistic picture of Marine Midland's operations, earnings, earnings prospects and financial condition and to conceal various significant material facts relating to the foregoing..." (Complaint, ¶¶ 2, 8). The Complaint

charges that, as a result of both material concealments and omissions, and misstatements of material facts, defendants have violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5.

The Complaint elaborates these charges, describing thirteen specific categories of information concerning Marine Midland's condition and operations that are assertedly material to the investing public and to plaintiff, and with respect to which it alleges there has been an ongoing concealment by defendants of matters that should have been disclosed (Complaint, ¶¶ 9, 10). Thereafter, the Complaint charges that eleven separate and specific false and misleading statements were being contained in Marine Midland's 1973 and 1974 Annual Reports; and describes the bases on which these statements are said to be false and misleading (Complaint, ¶ 11).

4. We submit that this Complaint, containing well-considered and carefully articulated charges of violations of both the federal securities laws and the common law against Marine Midland and the other defendants, is in and of itself strong evidence that this is an action worthy of serious consideration by the Court and worthy to be litigated upon its merits.

5. At the same time, perusal of the Complaint itself, we submit, manifests the inappropriateness of an attempt at class action determination prior to completion of substantial discovery. It was not possible for plaintiff to set forth the precise dates upon which the wrongful course of conduct alleged, involving multiple omissions with regard to broad categories of matters, as well as specific misrepresentations, commenced; nor was it possible to state when, or even if, full disclosure has taken place. Thus, quite apart from the questions that defendants would undoubtedly raise as to the propriety of class treatment,

the scope of the class that this plaintiff could represent, the possible appropriateness of subclasses and the like, it is impossible at this stage of the litigation to determine even the outside parameters of a class. Under such circumstances, any attempt by plaintiff to force the issue would have been frivolous, and an imposition on both the Court and the defendants.

6. Defendants' responses to the Complaint bear out our contention. Moreover, they demonstrate that, while the policy that all cases should be processed expeditiously is always significant, the concept of expeditiousness must be flexible. To date, only three defendants -- Marine Midland, John L. Hettrick and David Laub (who answered jointly) -- have joined issue in this case, out of the seventeen defendants on whom service has been made. Recognizing that the scope and complexity of this action make it appropriate to do so, we have agreed to extend the time of all other defendants who have asked for such accommodation. With regard to the "outside" directors of Marine Midland, we agreed that they would not be required to respond to the Complaint until 10 days after we make demand for an answer. This agreement was confirmed by a letter from Messrs. Paul, Weiss, Rifkind, Wharton & Garrison, dated February 24, 1976. Of course, there has been no formal stipulation entered into, or approved by the Court; and it could be argued that all individual defendants served, other than Hettrick and Laub, are in technical default at this time. But in view of our commitment, we would consider it unconscionable to make such a claim. We refer to this informal arrangement solely to indicate our conviction that, in the light of all the circumstances herein, plaintiff should not suffer the sanctions sought by the moving defendants as a penalty for any alleged failure to proceed expeditiously.

7. With respect to defendant Price Waterhouse & Co.,

we entered into successive stipulations extending its time to answer or move with respect to the Complaint, first to April 1, 1976, and then to May 1, 1976. On April 30, 1976, we entered into a further stipulation with that defendant, concerning the time for our response to its interrogatories, which also granted further extension of its time to answer or move, until June 18, 1976, without prejudice to the pending motion. A copy of this stipulation is annexed as Exhibit "2" hereto.

8. Also bearing upon the present posture of the case, and the impracticability of any attempt by plaintiff to go forward with the class action determination and other steps necessary to prepare plaintiff's case for trial, are the interrogatories served upon plaintiff by defendants Marine Midland, et al. We have sought, and received, two successive extensions of time to answer or otherwise respond to those interrogatories, so that such response is now due on May 26, 1976. This, however, is no indication of any dilatory action or intention on our part. Those interrogatories, denominated "First Set," comprise eighty pages, whose numbered paragraphs, subparagraphs and subsubparagraphs include more than 300 separate inquiries. Many, if not all, of these 300 inquiries are themselves compound and complex questions. They go far beyond seeking to discover the "basic grounds" upon which the action is based (Marine Midland, et al., Memorandum, p. 14). On the contrary, they include prolix and burdensome contention interrogatories, and demand complete identification and description of facts, documents and other evidentiary material that defendants must know is not now available to plaintiff or her counsel. The oppressive and burdensome character of these interrogatories is illustrated by defendants' demand that plaintiff define virtually every operative word and phrase contained in the substantive allegations of the Complaint. For example,

Interrogatory No. 5 contains 31 separate inquiries, including no fewer than 13 separate demands for the definition of words or phrases -- although these defendants were clearly able to answer the Complaint without such definitions. We submit that the purpose of interrogatories of this nature, particularly at an early stage in this kind of action, is not really discovery of information. Rather, they are designed to require plaintiff, and plaintiff's counsel, to devote an exorbitant amount of time and effort to framing answers, objections or other responses -- and thus to detract from plaintiff's ability to press plaintiff's case. Whether or not these interrogatories are, individually or collectively, proper ones, their utilization is clearly inconsistent with the professed interest of the moving defendants in the rapid progress of this case.

9. In fact, we respectfully submit that it was virtually implicit from the various accommodations asked for and received on both sides of this litigation, and from the nature and extent of discovery sought by defendants in their "first wave" interrogatories, that plaintiff would not press forward until she had responded to the interrogatories posed, and until the various defendants had been able to formulate their response to the Complaint. We recognize that this should not have been allowed to remain implicit, and that at the various times when we entered into other stipulations and extensions of time with defendants, we should have sought and submitted a formal stipulation for the consideration of the Court with respect to deferral of the class action motion -- just as the various individual defendants who have not answered should have sought and submitted a formal stipulation with regard to their response to the Complaint. And, if we were unable to obtain such a stipulation, we should have made formal application for such a deferral. However, we further

respectfully submit that we have shown that, in the light of the nature and posture of this case, our omission has neither prejudiced defendants nor slowed unreasonably the movement of this case forward toward eventual trial or other disposition. The complexity of the case itself, with the concomitant need on all sides for more than the ordinary time to respond to pleadings, interrogatories and the like, and not the lack of a class action motion or a class action determination, has been determinative of the pace of movement herein. We submit that it has not moved more slowly than most other cases of this dimension and nature.

10. Moreover, the lack of a class action determination is no bar to the continuation of other pretrial preparation. On the contrary, there is significant authority that in cases like this one it is appropriate that discovery, and even determinations of liability or non-liability should be accomplished prior to class action determination (Plaintiff's Memorandum of Law, Pt. I). Where, as here, questions as to definition and parameters of the class are closely interwoven with questions going to the merits, we submit that this is perfectly appropriate, and prejudices neither the parties nor the administration of justice.

11. Defendants have also raised the argument that our inadvertent omissions in this action should lead to dismissal on the grounds that plaintiff and her counsel have demonstrated their inability to represent the class adequately. Since the only aspect of adequacy of representation that has been raised by defendants here goes to our own willingness and ability to prosecute this action, we take the liberty at this point to offer, in contravention of defendants' assertion, some material bearing upon this firm's competence, ability and reputation in this field.

12. We have had considerable experience, particularly in the field of stockholders' litigation, and our expertise has

been recognized by the courts. Judge Pollack, presiding at a settlement hearing in a derivative action entitled Zerkle, et al. v. Cleveland Cliffs Iron Co., et al., 70 Civ. 2507, made the following comment about my firm:

"I know of your standing in the community and also your standing at the Bar, and have a very high opinion of the expert knowledge, competence and fairness with which you conduct derivative litigation."

13. In a series of class actions entitled Berland v. Great American Industries, et al., 66 Civ. 1755, Judge (now Circuit Judge) Mansfield appointed our firm as general counsel for all the plaintiffs. Thereafter, in deciding a motion to declare the consolidated action a class action, Judge Mansfield had occasion to refer to his earlier appointment of our firm as general counsel for the consolidated action. In that connection, in his opinion (48 F.R.D. 121 (S.D.N.Y. 1969)), he said about our firm's representation of the plaintiffs (at p. 127):

"They are represented by outstanding counsel who are experienced in the conduct of stockholders' litigation and aware of their responsibilities."

He added (at p. 127):

"We are satisfied, therefore, that both plaintiffs and their counsel would adequately represent the class and that there is no likelihood that they would handle or dispose of the litigation in a collusive manner or act in any way antagonistic to the interests of the class."

At a later point (at p. 128), he referred to our firm as the plaintiffs' "high-calibre, experienced counsel." The actions were thereafter settled with substantial benefits gained by the members of the class.

14. We have been designated as general, lead or liaison counsel in numerous actions in both state and federal courts in stockholders' actions. Recently, my firm was designated by Judge Lee P. Gagliardi as liaison counsel for plaintiffs in all of the actions commenced in the Southern District of New York arising

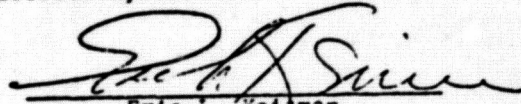
out of the Equity Funding Corporation of America scandal. We were also recently appointed lead counsel by Judge Lloyd MacMahon in Lewis v. Teleprompter Corp., 73 Civ. 3929 (S.D.N.Y.), a consolidation of seven class actions brought on behalf of the shareholders of Teleprompter. We were designated general counsel in both the state and federal courts in Rabinowitz v. Carter Group, 69 Civ. 4361 (WK), and Boorstin v. Utilities & Industries, Inc., 17825/1969, involving six consolidated class actions brought on behalf of the shareholders of Utilities & Industries, which resulted in a benefit to the class in excess of \$10,000,000. In Abrams v. Occidental, 67 Civ. 2858, we were appointed general counsel for the stockholder plaintiffs in three consolidated class actions that involved important questions under Section 16(b) of the Securities Exchange Act that were ultimately decided in the United States Supreme Court. We were appointed general counsel by former Chief Judge Zavaat in Loewi v. Fairchild Hiller, an action in the United States District Court for the Eastern District of New York. Judge Mansfield appointed my firm lead counsel in a series of derivative and class actions entitled Abramson v. Karp, et al., 69 Civ. 1617, involving Realty Equities Corp. In Franklin v. Blaylock, 62 Civ. 4067, an action in the Southern District of New York, involving Ling-Temco-Voight, Inc., we acted as general counsel in four related cases by agreement of the various attorneys for the plaintiffs. In Abrams v. Gamble-Skogmo, 64 Civ. 7, an action in the Southern District of New York, involving Allegheny Corporation, we acted as general counsel in the trial of three related cases before Judge Bonsal, which resulted in a substantial settlement during the trial for the benefit of Allegheny.

15. In the case of Rich v. Reisini, 266 N.Y.S.2d 492 (1st Dept. 1966), the Appellate Division, First Department in New

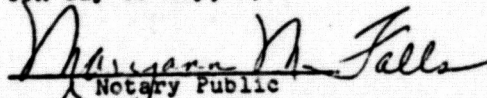
York, in an opinion by Mr. Justice Steuer, overruled a lower court appointment of other general counsel and appointed my firm instead, stating that the designation of my firm as general counsel would be "best calculated to further the plaintiffs' interest...."

16. In the instant case, we have every intention to uphold the standard of representation for which we have been recognized; and we assure the Court that we will do so.

17. In the light of all the foregoing, we respectfully submit that the discretion vested in this Court pursuant to Local Rule 11A should not be exercised so as to impose punitive sanctions upon plaintiff and her counsel, nor to sound the death knell of what, we submit, is a serious and meritorious litigation. We further respectfully submit that, due to the factors discussed hereinabove, this case is not presently ripe for class action determination; and that such determination should be deferred by this Court until an appropriate future time -- either until the completion of discovery, or to such other appropriate point as the Court may, in its discretion, determine to be proper.


Eric L. Keisman

Sworn to before me this
6th day of May, 1976.


Notary Public
MARYANN M. FALLS
Notary Public, State of New York
No. 01FA4521798
Qualified in Westchester County
Commission Expires March 30, 1978

9119

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W.F. Roll

5-20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WF
5/24/76

-----x
ANNE K. UNGER,

Plaintiff,

: 76 Civ. 481 (CMM)

-against-

EDWARD W. DUFFY, et al.,

:
AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS

Defendants.
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RONALD W. MEISTER, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and am associated with the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for defendants James W. McKee, Jr., Allen H. Neuharth, David H. Northrup and Gerald C. Saltarelli. I am familiar with the proceedings had herein and submit this affidavit in support of the motion of defendants Marine Midland Banks, Inc. ("Marine Midland"), John L. Hettrick and David J. Laub to dismiss this action as a class action pursuant to Civil Rule 11A of this Court.

2. I have read the affidavit of John Dickey and the memorandum of law in support of the motion to dismiss, and hereby adopt the arguments set forth therein.

3. In addition to those arguments, it is evident from the face of the complaint that plaintiff is an inadequate representative of the purported class because she allegedly purchased shares of the common stock of Marine Midland at a time before defendants McKee, Neuharth, Northrup and Saltarelli became directors of Marine Midland.

4. Plaintiff alleges (Complaint, ¶3) that she purchased shares of the common stock of Marine Midland "in or about August 1974."

5. I am informed by defendants Northrup and Saltarelli that they were elected directors of Marine Midland on January 15, 1975. This date is confirmed in the 1974 Annual Report of Marine Midland.

6. I am informed by defendants McKee and Neuharth that they were elected directors of Marine Midland on September 18, 1974.

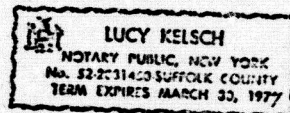
7. Since plaintiff purchased her shares before these defendants became directors of Marine Midland, she is not an adequate representative of an alleged class having claims against these defendants.

8. Accordingly, the motion of defendants Marine Midland, Hettrick and Laub to dismiss this action as a class action should be granted.

Ronald W. Meister
Ronald W. Meister

Subscribed and sworn to before
me this 2nd day of May, 1976

Lucy Kelsch



55a
1001 J. J. 571
5/2/72
C.D.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
AIME K. UNGER, :
Plaintiff, : 76 Civ. 481 (CIV)
-against- :
EDWARD W. DUFFY, et al., : RESPONSE TO
Defendants. : INTERROGATORIES TO
: PLAINTIFF, SET NO. 1,
: OF DEFENDANT PRICE
: WATERHOUSE & CO.
-----x

Plaintiff, Anne K. Unger, responds to the Interrogatories of defendant Price Waterhouse & Co. as follows (the paragraphs and subparagraphs of this Response are numbered and lettered so as to correspond to the numbering and lettering of the Interrogatories):

1. The plaintiff's full name is Anne K. Unger. She is 74 years of age, is married and resides at 222 Seaman Avenue, New York, New York, where she has resided for 28 years.

2. (a) The plaintiff is a housewife; (b) and has been for 41 years; (c) and was previously in the occupation of legal secretary; (d) for a period of approximately 15 years beginning in or about 1918.

3. Plaintiff was graduated from the Washington Irving High School in or about 1918.

4. Not applicable.

5. (a), (b), (c) Plaintiff purchased one hundred (100) shares of Marine Midland common stock on the trade date August 19, 1974; this being the only occasion on which she purchased such shares.

(d) Plaintiff paid \$18.00 per share, and the gross purchase price was \$1,841.14.

(e) The broker was Hayden Stone Inc., 5 Corporate Park Drive, White Plains, New York.

(f) Plaintiff is the holder of record.

57a

(g) The certificate representing such shares is
Certificate No. NC 387631.

(h) None.

(i), (j), (k), (l), (m), (n) Not applicable.

(o) One hundred (100) shares.

(p) Plaintiff is the holder of record.

6. Not applicable, inasmuch as plaintiff has never
purchased or sold any such securities.

7. No one.

8. No such person has so communicated.

9. Not applicable.

10. Plaintiff cannot identify any specific document.

Plaintiff generally follows the financial pages of The New York
Times and may have seen some mention of Marine Midland, but
cannot recall. Plaintiff does recall forming the general impres-
sion that the shares of major banks, including Marine Midland,
were good, conservative income investments.

11. There were none.

Dated: New York, New York
May 26, 1976

Anne K. Unger
ANNE K. UNGER

58a

DOCK NO. 76 Civ. 481 (CMH)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANNE K. UNGER,

Plaintiff,

-against-

EDWARD W. DUFFY, CHARLES G. BLAINE,
WM. HAD FOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETTRICK, ROBERT W. HUBNER,
NORTHRUP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON,
JAMES P. LEWIS, SOL M. LINOWITZ,
WILLIAM A. LYONS, JAMES W. MCKEE, JR.,
ALLEN H. NEUHARTH, DAVID H. NORTHRUP,
NATHAN R. OWENS, CORNELIUS W. OWENS,
CLIFTON W. PHALEN, GERALD C. SALTERELLI,
PAUL A. SCHOELLKOPF, WILLIAM H. WENDEL,
JOHN WILKIE, CHARLES A. WINDING, GERALD
B. ZORNOW, MARINE MIDLAND BANKS, INC.,
and PRICE WATERHOUSE & CO.,

Defendants.

NOTICE OF MOTION AND AFFIDAVIT

CRAVATH, SWAINE & MOORE

Attorneys for Defendant Price Waterhouse & Co.

ONE CHASE MANHATTAN PLAZA
NEW YORK, N. Y. 10022

Tel. No. MA 6000 2-3000

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August 6, 1976 This motion is
granted. See opinion on
Companion Motion to Dismiss

Charles M. Nathan

U. S. D. J.

MICROFILM

AUG 9 1976



BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNE K. UNGER,

Plaintiff,

-against-

EDWARD W. DUFFY, et al.,

Defendants.

MEPNER, D. J.:

44933
76 Civ. 481
(CMN)FILED
U.S. DISTRICT COURT
AUG 6 11 41 AM '76
S.D. OF N.Y.

Defendants Marin Midland Banks, Inc. and Price

Waterhouse & Co. move to dismiss this action as a class action due to plaintiff's failure to comply with Civil Rule 11A of this court. Rule 11A in essence provides that plaintiff must move for class action status within 60 days after filing the complaint. If such motion is not made, defendant may move within 30 days after expiration of the 60-day period for dismissal as a class action.

The complaint in this action was filed on January 27, 1976. On April 28, 1976, 89 days later, defendants brought the instant motion. Plaintiff responds that her failure to move for class action determination was inadvertent and requests that such determination be deferred, preferably until after the completion of discovery. She asserts the need to complete discovery

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in order to establish the precise limits of the class she wishes to represent. She also believes that discovery is necessary because of her uncertainty as to when the allegedly unlawful conduct of the defendants began and ended. The complaint alleges misrepresentations and omissions by defendants with respect to many of the transactions and operations of Marine Midland Banks, Inc., as well as specific misrepresentations in reports and statements.

Civil Rule 11A emphasizes "an early determination of whether the action is properly a class action 'and, if so, the membership of the class.'" Wolfson v. Solomon, 54 F.R.D. 534 (S.D.N.Y. 1972) (emphasis in the original). The rule implements the requirement of Rule 23(c)(1), Fed. R. Civ. P. that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

Discovery by plaintiff is not necessary to determine class action status. Plaintiff knows her relationship to the alleged wrongdoing. Class action orders are always subject to change as discovery proceeds. Rule 23(c)(1), Fed. R. Civ. P.

Sufficient reason has not been given for plaintiff's failure to comply with the rules.

61a

The action is dismissed as a class action,
but of course may be maintained as an individual action.

So ordered.

Dated: New York, N. Y.
August 5, 1976

Charles H. Lutz
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

5.00 PM

-----x
ANNE K. UNGER,

Plaintiff,

-against-

76 Civ. 481 (CMH)

NOTICE OF APPEAL

EDWARD W. DUFFY, CHARLES G. PLATNE,
WM. WARD WOSHAY, ULRIC HAYNES, JR.,
JOHN L. HETTPICK, ROBERT W. HUBNER,
MONTHRUP R. KNOX, FELIX E. LARKIN,
DAVID J. LAUB, JOHN S. LAWSON, JAMES
P. LEWIS, SOL M. LINOWITZ, WILLIAM
A. LYONS, JAMES W. MCKEE, JR., ALLEN
R. MEINHART, DAVID H. NORTHRUP,
NATHAN H. OWEN, CORNELIUS W. OWENS,
CLIFTON W. PHALEN, GERALD C.
SALTARELLI, PAUL A. SCHOELLKOPF,
WILLIAM H. WENDEL, JOHN WILKIE,
CHARLES A. WINDING, GERALD B.
ZONHOW, MARINE MIDLAND BANKS, INC.
and PRICE WATERHOUSE & CO.,

Defendants.

[Handwritten signature]

SEP 4 1976
PL. 76

-----x
Notice is hereby given that Anne K. Unger, plaintiff
above named, hereby appeals to the United States Court of
Appeals for the Second Circuit from the order dismissing this
action as a class action, entered in this action on the 5th day
of August, 1976, and filed on August 6, 1976.

Dated: New York, New York
September 2, 1976

WOLF POPPER ROSS WOLF & JONES

By *[Handwritten signature]*

CRAVATH, SWAIN & MOORE
ONE CHASE MANHATTAN PLAZA
NEW YORK, N.Y.

Attorneys for Plaintiff
Office and P. O. Address
845 Third Avenue
New York, New York 10022
(212) 759-4600

PAUL WEISS, RITKIN, WHARTON
& GARRISON
300 PARK AVENUE
NEW YORK, N.Y.

SULLIVAN & CROMWELL
48 WALL STREET
NEW YORK, N.Y.

Service of Bill copies of this within

Appendix is admitted this

29 day of October 1976

Sullivan & Gonnell
ATTORNEY FOR Maime

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10-24-76
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Gonnell, Sullivan & Maime
Attys for Maime